No. 85-2057 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Appellant,

— against —

THE STATE BOARD OF EQUALIZATION
AND ASSESSMENT, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE STATE BOARD OF EQUALIZATION AND ASSESSMENT

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Questions Presented

1. Whether ripeness for review in this Court is demonstrated where appellant concedes that all that has yet been resolved (*i.e.*, the equalization rate) is but one element of a tax assessment, where the "valuation" component of such assessments is currently the subject of trials in 168 related proceedings in multiple taxing jurisdictions for many separate tax years.

2. Whether, contrary to *Bi-Metallic Investment Co. v State Board of Equalization*, 239 US 441 (1915), appellant presents a substantial federal constitutional question with its claimed due process right to a hearing on an across-the-board matter of legislative fact, *i.e.*, the equalization rate.

3. Whether appellant has properly framed (Question Presented No. 2 [J.S., p. "i"]) a claim that the State Board of Equalization and Assessment ("State Board") "assessed appellant's real property in a manner contrary to law", when, in reality, appellant's claim rests on an interpretation of ambiguous statutes which divided the courts that first considered the question in 1979-1981, but which statutes were clarified by legislative amendment in 1982 *before* any proof was offered, trials held or judgments entered.

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Counter-Statement of the Case

Appellant's view of the case (J.S. 3-9)[1] is incomplete. A brief explanation of special franchises and their history as a unique class of property will aid in understanding the case, and will demonstrate that appellant's claims are meritless.

[1] References in parentheses to "J.S." refer to pages of the Jurisdictional Statement. Numerical references prefixed by "A" refer to the Appendix to the Jurisdictional Statement.

This litigation involves challenges by a public utility to real property tax assessments on "special franchises", *i.e.*, the pipes, wires and other devices in, on, under or above public thoroughfares and the permission granted by government to place them there. The assessments, commencing in 1974, involve special franchises in New York City and its environs.

Appellant has asserted three theories of assessment error: (1) *overvaluation*, meaning that the "full value" assessed was in excess of actual value; (2) *inequality*, meaning appellant's assessment amounted to a greater percentage of the full value of its property than was true of other properties in the same taxing district; and (3) *illegality*, meaning that there were untimely assessments or erroneous (clerical) computations of the tax.

This appeal involves solely the *inequality* claims of the petitions. None of the inequality petitions has gone to trial. The illegality claims have been dismissed. Many *overvaluation* proceedings have been tried and are *sub judice* in the trial court. No trial has been held; no evidence has been offered; and no evidentiary hearings of any kind have been held in any of the *inequality* cases.

The singular characteristics of special franchises warrant a brief historical review. Unlike ordinary realty, special franchises have always been assessed by the State rather than localities. Lee & LeForestier, *Review and Reduction of Real Property Assessments in New York* (2d ed 1978), § 8.01; *see also, Report on Sepcial Franchise Assessment Administration* (SBEA: December 14, 1983). Special franchises were first taxed in 1899, when the State Board of Tax Commissioners (a predecessor to the current State Board of Equalization and Assessment) was created. L 1896, ch 908, §§ 170-172. The rights of utilities to place pipes, wires, etc. on public property were defined as special franchises and were categorized as a distinct class of real property subject to tax. L 1899, ch 712, §§ 1, 2; former Tax Law § 2 (subd 3); § 42, currently codified at RPTL § 102, subd (17). The tax, including the classification scheme, easily withstood due process and equal protection objections lodged by the utilities. *People ex rel.*

Metropolitan Street Railway v State Board of Tax Commissioners, 174 NY 417, 431-435 (1903), *affd* 199 US 1 (1905).

In the more than four-score years since then, special franchises have not been "equalized" in the same manner as ordinary realty and the governing statutes have never so required. *See* Lee & Le Forestier, *op. cit.*, § 8.04. Equalization, in simple terms, means the ratio of assessed value to full value and a property is "equalized" with comparable property when it is assessed at the same fraction of full value as is comparable property. In theory, if all properties were assessed at their full value, there would be no need for an equalization rate for judicial review of assessments. *Foss v City of Rochester*, 65 NY2d 247, 253 (1985). Since properties are not generally assessed at their full value, in an inequality case, a petitioner seeks to have its property "equalized", *i.e.*, its net assessment computed at the same fraction of full value as comparable properties. *See Guth Realty v Gingold*, 34 NY2d 440, 448 (1974). As set forth below, the governing statutes do not require that special franchise properties be assessed, equalized or reviewed judicially in the same manner as ordinary realty.

Any consideration of the special franchise equalization scheme must start with RPTL § 606. Since 1953 (L 1953 ch 874), the Legislature has expressly directed the State Board to assess special franchise properties by applying the latest state equalization rate to the full value of the assessment. Hence, special franchises have been assessed differently from ordinary realty. Ordinary realty was subject either to the old full value assessment provision (former RPTL § 306, the basis for the *Hellerstein* decision)[2] or to the current uniform fractional percentage provision (RPTL § 305), which explicitly allows different ratios of assessment by class of property. Thus, section 606, entitled "Use of state equalization rates and special equalization rates in making special franchise

[2] *Matter of Hellerstein v Board of Assessors*, 37 NY2d 1 (1975). *Hellerstein* held, as a matter of state *statutory* law (*not* constitutional law), that all properties had to be assessed at full value. Thereafter, the Legislature changed the statutes to permit uniform fractional assessments by type of property. RPTL § 305.

assessments", for many years began with the injunction that:

> "Notwithstanding [RPTL § 306][3], in determining a special franchise assessment the state board shall apply the latest state equalization rate * * * to the full value of such assessment * * *." RPTL § 606, subd 1.

In short, the Legislature has always exempted special franchise assessments from the equalization provisions applicable to ordinary realty. This was always implicit in section 606. As set forth below, however, there was prior litigation in the case at bar over the meaning of those statutes. After the courts interpreted the statutes to allow the same type of inequality proof for special franchises as for ordinary realty (*Con Ed v State Board*, 73 AD2d 31, *affd* 53 NY2d 975), the Legislature made its prior assumption explicit. It is that clarifying legislation that appellant challenges here.

The statute to which appellant objects was enacted in 1982. RPTL § 744(1), added by L 1982, ch 714, § 24. It limits proof of inequality for a special franchise holder to the state equalization rate. Equalization rates in New York are not limited to single parcels or single taxpayers. To the contrary, these rates have significant legislative, debt and tax consequences statewide. These rates affect the apportionment of state aid to school districts. *See* Education Law § 3602; *see also*, 9 NYCRR subpart 186-6 (special equalization rates for school aid derived from state rates). These rates also affect computations of state constitutional debt and tax limitations for New York's five largest cities. *See* RPTL Article 12-A. Equalization rates thus have enormous practical consequences for local government finances. Indirectly, equalization rates determine tax rates set by localities, since funding not supplied by the State must be raised by local property tax levies. This history and background, not mentioned by appellant, is critical to a full understanding of the case.

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[3] The reference to section 306 was deleted when section 306 was repealed. L 1981, ch 1057.

Appellant asserts (J.S. 5) that prior to 1982, *all* owners of real property could prove *inequality* of assessment (*i.e.*, that its property was assessed at a higher percentage of full value than other properties) by any of three methods of proof. Those types of evidence include: [1] "selected parcel" appraisals; [2] "all sales", meaning all actual sales of properties in that tax year; and [3] the state equalization rate ("state rate") (*see* J.S. 5). Appellant fails to mention the complex history of litigation in this very case on the precise issue of whether those three means of proving inequality for ordinary realty owners *also* applied to special franchise holders.

Briefly, the statutory question involved was the meaning of RPTL § 740(1) which authorized judicial review of special franchise assessments "so far as practicable in the manner prescribed by this article for reviewing an assessment of real property." As the statutes read when this litigation was commenced in 1974, there were entirely separate provisions for assessment and review of ordinary realty as distinct from special franchises. *Compare* RPTL Article 5 *with* RPTL Article 6. Even the judicial review provision (RPTL Article 7) contained separate provisions for ordinary realty (RPTL §§ 700-738) and for special franchises (RPTL §§ 740-744).

Thus, RPTL § 740(1), which incorporated by reference only so much of ordinary realty judicial review provisions (*i.e.*, RPTL §§ 700-738) *as was practicable*, took on special significance. The provision governing proof of inequality for ordinary realty, RPTL § 720(3), authorized the three types of evidence (enumerated above). However, RPTL § 606 mandated that the State Board *must* apply the latest state equalization rate. Therefore, the State Board maintained throughout this litigation that the only proof of inequality necessary or admissible for special franchises would be the state equalization rate. Since RPTL § 606 mandated that special franchise assessments be equalized with the latest state rate, any other proof of inequality was irrelevent.

If this statutory discussion does not automatically commend itself to easy understanding, there is no reason that it should. Over

the years of this litigation, prior to the clarifying 1982 amendment, these statutory nuances baffled the courts on questions of statutory interpretation.

Decisions Below

A brief chronology of the diversity of judicial interpretation of those statutes *in the case at bar* is necessary. In 1979, the trial court held, purely as a matter of statutory interpretation, that the only relevant evidence for a special franchise holder to prove inequality would be the state rate. A-113 - A-121 (98 Misc 2d 491, 494-498; 413 NYS2d 1012). The Appellate Division, an intermediate court, reversed, with one justice dissenting on the basis of the trial court's opinion. A-105 - A-112 (73 AD2d 31; 425 NYS2d 651). The Appellate Division held, purely as a matter of statutory construction, that special franchise holders could establish the inaccuracy of the state rate by proving that the data used to calculate the rate were inaccurate. Ironically, the court was heavily influenced by "legislative findings" (quoted here by appellant [J.S. 15 & n 9]) enacted *after* the trial court decision in which the Legislature criticized state equalization rates in the context of *ordinary realty* litigation. Those "findings", which characterized state equalization rates as producing "spurious" or "counterproductive" results, prompted the split in the Appellate Division over the statutory interpretation question framed above. A-105 - A-112 (73 AD2d 31; 425 NYS2d 651). Thereafter, the Court of Appeals, by a 4-3 vote, affirmed on the opinion below. A-103 - A-104 (53 NY2d 975; 441 NYS2d 669). Three judges dissented on the basis of the trial court opinion on statutory interpretation. A-104.

All of those opinions (from 1979 through 1981) centered purely on questions of interpreting RPTL §§ 606, 720(3), 740(1) and 1202. All that was resolved by the 1981 Court of Appeals decision (A-103 - A-104 [53 NY2d 975; 441 NYS2d 669]) was that, as a matter of statutory interpretation — *not* constitutional doctrine — special franchise holders could employ the three alternative methods of proof discussed above.

Then, and before *any* evidence was offered, trials held, or judgments entered, the Legislature enacted L 1982, ch 714, adding RPTL § 744(1). This provision plainly limited the admissible proof to dovetail with a special franchise holder's statutory rights defined in RPTL § 606. Appellant now challenges the constitutionality of that 1982 legislation.

All the courts below rejected appellant's constitutional claims. The Court of Appeals, in unanimously affirming on the opinion of the Appellate Division (A-1; 67 NY2d 783; 501 NYS2d 22), adopted that court's reasoning (A-6 - A-13; 103 AD2d 453; 480 NYS2d 789). The unanimous Appellate Division reasoned that "special franchises are inherently different from other types of real property" (A-10; 103 AD2d at 458; 480 NYS2d at 793). The court also concluded that no due process or retroactivity problems were involved since no final determinations had ever been made as to appellant's inequality claims and because the Legislature merely clarified the then-ambiguous statutes before any evidence was received or judgments entered (A-11 - A-12; 103 AD2d at 459-460; 480 NYS2d at 794). In short, every court and every jurist to consider the question has found appelllant's current arguments to be utterly without merit.

Relief Requested

This Court should dismiss the appeal on the ground that it does not present a substantial federal question. Alternatively, this Court should affirm for the reasons stated by the courts below.

ARGUMENT

POINT I

AS APPELLANT HAS FAILED TO SATISFY THE THRESHOLD REQUIREMENT OF FINALITY, THIS COURT DOES NOT HAVE JURISDICTION OF THE APPEAL.

Appellant relies (J.S. 2 & n 2) on 28 USC § 1257(2) as the sole basis for this Court's jurisdiction. This statute begins with the operative language that "*[f]inal* judgments or decrees * * * may be reviewed by the Supreme Court * * *." 28 USC § 1257 (emphasis added).

The case is not final in any sense. Nor did it even satisfy the state court definition of finality so as to qualify for an appeal as of right *to* the court below. Appellant here obtained only the discretionary permission of the Appellate Division of State Supreme Court to pursue a further appeal to the New York Court of Appeals. 108 AD2d 1014, 491 NYS2d 278 (3d Dept 1985). An earlier appeal, purportedly taken as of right to the Court of Appeals, was dismissed by that court precisely because the appeal lacked finality. 64 NY2d 754 (1984). Appellant has omitted those decisions from the appendix to the Jurisdictional Statement.

The New York Court of Appeals has a statutory finality rule (NY CPLR 5601) which restricts appeals as of right in a manner similar to 28 USC § 1257(2). It operates to keep out of the state's highest court many cases which are incomplete, may never result in a final judgment, may become moot, or otherwise do not merit an immediate appeal. *Compare*, Cohen & Karger, *Powers of the New York Court of Appeals* (rev ed 1952), chapter 3; *with* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* (6th ed 1986), § 3.8, pp 122-124.

Therefore, this case lacks finality under 28 USC § 1257(2). Thus, the appeal should be dismissed for lack of jurisdiction.

POINT II

APPELLANT HAS NO DUE PROCESS RIGHT TO A HEARING ON ACROSS-THE-BOARD MATTERS OF LEGISLATIVE FACT SUCH AS THE EQUALIZATION RATE.

In an attempt to fashion a colorable due process claim, appellant has blurred the distinctions between valuation and equalization; has overlooked the difference between legislative facts and adjudicative facts, and has otherwise avoided discussion of settled doctrine emanating from this Court.

Appellant is vigorously pursuing at the trial court level its claims that the special franchise properties are assessed in excess of actual value. However, that right is not to be confused with its unavailing claim made in this proceeding that it is also entitled to challenge the equalization rate which applies to all special franchise properties. *See* RPTL § 606; RPTL, Article 12.

By relying upon *Londoner v Denver*, 210 US 373 (1908) (*see* J.S. at 12, 13), appellant simply mixes apples with oranges. Unquestionably, *Londoner* gives appellant a right to protest alleged *overvaluation* of its own property. *Id.* at 386. However, this appeal involves *equalization*, not valuation. In *Bi-Metallic Investment Co. v State Board of Equalization*, 239 US 441 (1915) (Holmes, J.), this Court held that there is no due process right to a hearing on the broader questions of equalization or tax rates, which apply to all taxpayers. *Id.* at 445. The establishment of such rates is a legislative determination for which there are no due process rights to a hearing. *Id.*

Across-the-board revenue measures applicable to all parties constitute "legislative facts" which do not create entitlement to due process hearings. 3 Davis, *Administrative Law Treatise* (2d ed 1980), § 15:9, p 163. To be sharply contrasted with such broad judgments are facts that are highly specific, narrow, controversial, linked directly to the parties; only these latter "adjudicative"

facts entitle a petitioner to any hearings. 3 Davis, *loc. cit.* As set forth above (p 4), equalization rates — affecting as they do numerous tax, debt and state aid matters — are legislative facts for which taxpayers have no due process right to a hearing.

In short, *Bi-Metallic*, not cited by appellant, is dispositive here. *See also, United States v Florida East Coast R. Co.*, 410 US 224, 244-245 (1973); *Minnesota State Board for Commercial Colleges v Knight*, 465 US 271, 285 (1984).

POINT III

APPELLANT HAS NOT DEMONSTRATED THAT ITS PROPERTY HAS BEEN ASSESSED IN A MANNER CONTRARY TO LAW.

In its second question presented (J.S., at i), appellant asserts that its properties have been assessed contrary to law. Appellant boldly contends (J.S. 4-8, 12) that special franchise properties must be assessed in the same manner as — and assessments reviewed by the same proof applicable to — ordinary realty. Indeed, appellant asserts (J.S., 4) that "[t]he reason for this procedure is to assure uniformity of assessment for real property, all of which, including special franchises, is a single class for tax purposes." Appellant is mistaken.

In our counter-statement of the case (*supra*, p 6), we have already unmasked appellant's selective citation to the relevant statutes. We have shown how RPTL § 606 sets up a distinct assessment methodology for the unique class of special franchises. We simply add that there is a long-standing dichotomy between special franchise properties and all other types of realty. *Brooklyn Union Gas Co. v State Board of Equalization and Assessment*, 65 NY2d 472, 485 (1985), *cert denied*, ____US____, 106 S Ct 1461 (1986) (special franchise properties are a "specialty" as to which there is no market); *People ex rel. Metropolitan Street Railway v State Board of Tax Commissioners*, 174 NY 417, 431-435 (1903), *affd*, 199 US 1 (1905) (setting forth early history of this unique type of property); *see also*, Lee & LeForestier, *Review and Reduction of Real Property Assessment in New York* (2d ed 1978), § 8.01.

Appellant's reliance (J.S. 4 & n 5) on RPTL § 1202 does not alter the above analysis. Although section 1202, considered in conjunction with RPTL § 305, provides that for ordinary realty, property should be assessed as near as may be to full value or a uniform fractional percentage thereof, and, thus, incorporates by reference the three types of inequality proof enumerated in RPTL § 720(3), there was no reason to have those types of inequality proof applicable to special franchise properties. For ordinary realty, there is *no* statutory provision which equalizes or reduces the assessment. However, for the unique class of special franchise properties, there is a built-in adjustment in the form of the RPTL § 606 equalization for special franchise properties.[4] A further peculiarity of special franchises is the so-called "pegging law" (L 1953, ch 874) by which the "full value" of pre-1953 property is "frozen" in place and protected from increase in assessment.

Hence, with different types of property, there is no constitutional requirement that the system of taxation be identical. *Kentucky Railroad Tax Cases*, 115 US 321, 337 (1885) (state may classify railroads separately for purposes of taxation); *Nashville C. & St. L. Ry. v Browning*, 310 US 362, 368-369 (1940) (utilities and railroads are separate classes). Hence, appellant's equal protection argument (J.S. 10-11) is frivolous.

Appellant's due process argument grounded in retroactivity (J.S. 12) is equally without merit. As demonstrated above, the governing statutory provisions were ambiguous from 1979 through 1981; were interpreted by sharply divided courts during that time; but were amended and clarified in 1982 (L 1982, ch 714) *before* any proof was offered, trials had or judgments entered. Thus, as the courts below unanimously held (A-14 - A-24 [120 Misc 2d 617; 466 NYS2d 575]; A-6 - A-13 [103 AD2d 453; 480 NYS2d 789];

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[4] Special franchises have always been a *sui generis* category of property for several reasons: they are essentially a grant of public property permitting pipes, wires, etc. in, on, under or above public streets. Also, they cross many jurisdictional lines. And, of course, there is no market for such properties. *Brooklyn Union Gas Co.*, 65 NY2d 472, 485.

A-1 [67 NY2d 783; 501 NYS2d 22]), no rights vested. A mere change in statutory law for pending cases (where no final judgments have been entered) implicates no constitutional claim, whether couched in due process or retroactivity terms. *See Demorest v City Bank Co.*, 321 US 36, 48-49 (1944) (rejecting vested rights claim predicated on decisional law; holding that even legislation affecting substantive property rights can be amended or clarified and applied to pending proceedings as long as final judgments are not upset). In any event, this Court has long upheld statutes which retroactively classified property in separate categories for purposes of taxation. *Florida Central Peninsula R.R. Co. v Reynolds*, 183 US 471, 473-474 (1902); *White River Lumber Co. v Arkansas*, 279 US 692, 698-699 (1929); *Illinois Central R. Co. v Minnesota*, 309 US 157, 164-165 (1940). In short, appellant's due process and retroactivity arguments have no merit.

CONCLUSION

THIS COURT SHOULD DISMISS OR AFFIRM.

Dated: Albany, New York
July 28, 1986

Respectfully submitted,

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